IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SOUTHCO, INC., Plaintiff, v. FIVETECH TECHNOLOGY, INC. a/k/a WU XIANG TECHNOLOGY COMPANY, LTD. a/k/a 5TECH, Defendant.	:	Civil Action No.10-cv-01060-MAM
FIVETECH TECHNOLOGY, INC. a/k/a WU XIANG TECHNOLOGY COMPANY, LTD. a/k/a 5TECH, Counterclaim Plaintiff, v. SOUTHCO, INC., Counterclaim Defendant	:	JURY TRIAL DEMANDED

ORDER

AND NOW, this _____ day of ___________, 2011, upon consideration of PLAINTIFF SOUTHCO, INC.'S MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 37(b)(2) FOR FAILURE TO COMPLY WITH DISCOVERY ORDER (Docket No. __) and supporting papers, and Defendant Fivetech Technology Inc's response thereto, IT IS HEREBY ORDERED that the Motion is GRANTED. IT IS FURTHER ORDERED that:

1. Fivetech Technology Inc.'s Counterclaims IX and X are dismissed with prejudice.

2. Fivetech Technology Inc. shall pay the reasonable expenses incurred by Southco, Inc. in bringing this motion, including attorneys' fees.

3. Southco, Inc. shall submit an itemized list of expenses, including attorneys' fees, incurred in bringing this motion, within thirty (30) days of entry of this Order.

BY THE COURT:

____
MARY A. McLAUGHLIN, J

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PLAINTIFF SOUTHCO, INC.'S MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 37(b)(2) FOR FAILURE TO COMPLY WITH DISCOVERY ORDER

1. Plaintiff Southco, Inc. ("Southco"), by and through its counsel, respectfully moves this Court pursuant to Fed. R. Civ. P. 37(b)(2) for an order imposing sanctions on Defendant Fivetech Technology Inc. ("Fivetech") and counsel for failing to:

(a) obey the Court's Order of June 27, 2011, granting Southco's motion to compel the production of documents responsive to Request No. 6 of Plaintiff Southco, Inc.'s First Set Of Requests For Production Of Documents And Things To Defendant Fivetech Technology, Inc.;

(b) provide a full and complete response to Interrogatory No. 5 of Plaintiff Southco, Inc.'s First Set Of Interrogatories To Defendant Fivetech Technology, Inc.; and

(c) negotiate limitations in respect of Interrogatory No. 3 and Document Requests Nos. 3 and 4.

2. As sanctions, Southco requests that the Court enter an order pursuant to Fed. R. Civ. P. 37(b)(2)(A)(3) striking Fivetech's counterclaims IX and X, and ordering Fivetech and Fivetech's counsel to pay Southco its reasonable expenses, including attorneys' fees, in respect of this motion.

3. The grounds for this motion are set forth in an accompanying memorandum of law, and supported by an accompanying Declaration of Antranig Baronian. A form of order accompanies this motion.

Respectfully submitted,

July 27, 2011

s/Alex R. Sluzas/
James C. McConnon (PA13011)
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Attorneys for Southco, Inc.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF SOUTHCO, INC.'S MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 37(b)(2) FOR FAILURE TO COMPLY WITH DISCOVERY ORDER

Plaintiff Southco, Inc. ("Southco") seeks an order pursuant to Fed. R. Civ. P. 37(b)(2) imposing sanctions on Defendant Fivetech Technology Inc. ("Fivetech") and counsel for failing to:

(a) obey the Court's Order of June 27, 2011, granting Southco's motion to compel the production of documents responsive to Request No. 6 of Plaintiff Southco, Inc.'s First Set Of Requests For Production Of Documents And Things To Defendant Fivetech Technology, Inc.;

(b) provide a full and complete response to Interrogatory No. 5 of Plaintiff Southco, Inc.'s First Set Of Interrogatories To Defendant Fivetech Technology, Inc..; and

(c) negotiate limitations on the discovery requested by Southco's Interrogatory No. 3 and Document Request Nos. 3 and 4.

Southco seeks an order dismissing the two of Fivetech's counterclaims (IX and X) that relate directly to the discovery Fivetech has failed to provide, and for Southco's costs to bring this motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 27, 2011 the Court entered an Order (D.I. 81) granting in part Plaintiff Southco, Inc.'s Motion to Compel Discovery Responses by Defendant Fivetech Technology, Inc. (D.I. 70). The motion to compel was granted with respect to Interrogatory No. 5 and with respect to Document Request No. 6. On July 11, 2011 counsel for Southco wrote to counsel for Fivetech, noting that no response had been received from Fivetech regarding either Interrogatory No. 5 or Document Request No. 6. (Declaration of Antranig Baronian, ¶ 2, Exh. A). On July 13, 2011, counsel for Fivetech wrote to counsel for Southco, identifying only one individual at each of Fivetech, Inventec and Southco having personal knowledge of any of the allegations set forth in Paragraphs 100 to115 of Fivetech's Answer (D.I. 57). (Baronian Decl., ¶ 3, Exh. B). On July 15, 2011, counsel for Southco wrote to counsel for Fivetech, noting that Fivetech's response was incomplete and that Fivetech had not yet responded to Document Request No. 6. (Baronian Decl., ¶ 4, Exh. C). No response to Southco's letter of July 15, 2011, has been received. (Baronian Decl., ¶ 5).

In addition, the Court ordered the parties to negotiate regarding Interrogatory No. 3, a revised interrogatory that is limited in time, geography and scope. The Court also ordered the parties to attempt to negotiate limitations to Document Requests Nos. 3 and 4. (D.I. 81). Southco attempted to initiate the negotiation. (Baronian Decl., ¶ 6, Exh. D). However, Fivetech once again refused to provide any responsive discovery. (Baronian Decl., ¶ 7, Exh. E). Although Southco has persisted in trying to negotiate with Fivetech, (Baronian Decl., ¶ 8, Exh. F), Fivetech has failed to respond to Southco's attempt to resolve these disputes. (Baronian Decl., ¶ 9).

II. LEGAL STANDARD

Fed. R. Civ. P. 37 specifically provides for discovery sanctions where a party fails to obey a discovery order. In particular, Rule 37(b)(2)(A) provides that the court "may make such orders in regard to the failure as are just," including, but not limited to, "an order that . . . designated facts shall be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order." Rule 37(b) also provides that in lieu of or in addition to another appropriate order, "the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

A trial court has discretion to dismiss a claim as a sanction for party's dilatory behavior, but dismissal should be reserved for "extreme" cases. *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 867-68 (3d Cir. 1984).

In the Third Circuit six factors must be weighed in deciding whether to dismiss a claim: (1) the extent of the party's personal responsibility, (2) prejudice to the adversary, (3) history of dilatoriness, (4) willfulness or bad faith of attorney's conduct, (5) efficacy of alternative sanctions, and (6) meritoriousness of the claim. *Id*. at 868-69. No single factor is dispositive. *Briscoe v. Klaus*, 538 F.3d 252, 263 (3d Cir. 2008). Each factor need not be satisfied for the court to dismiss an action. *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 221 (3d Cir. 2003).

Thus, the first *Poulis* factor is the extent of the party's personal responsibility.

The second *Poulis* factor is prejudice to the adversary party. Prejudice does not require "irremediable" harm. *C.T. Bedwell & Sons v. International Fidelity Ins. Co.*, 843

F.2d 693, 693 (3d Cir. 1988). A party can be prejudiced under the *Poulis* test by being required to pay the extra costs associated with delays and filing of motions necessitated by improper behavior. *Id.* at 693-94; *Poulis*, 747 F.2d at 868. Further, "the burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy is sufficiently prejudicial." *Ware, supra, at* 222.

The third *Poulis* factor is a history of dilatoriness. A "party's problematic acts must be evaluated in light of its behavior over the life of the case." *Adams v. Trustees, N.J. Brewery Trust Fund*, 29 F.3d 863, 875 (3d Cir. 1994).

The fourth *Poulis* factor is whether the conduct was willful or in bad faith. "Willfulness involves intentional or self-serving behavior." *Adams*, *supra*, 29 F.3d at 875.

The fifth *Poulis* factor is the effectiveness of alternative sanctions. Dismissal is a sanction of last resort. *Poulis*, *supra*, 747 F.2d at 869. It is incumbent upon the court to explore the effectiveness of lesser sanctions before ordering dismissal. *Id.* at 868.

The sixth *Poulis* factor is the meritoriousness of the claim or defense. In this inquiry, a claim will be deemed meritorious when the allegations of the complaint, if established at trial, would support recovery. *Poulis*, *supra*, 747 F.2d at 870.

III. ARGUMENT

Since Southco has been prejudiced by Fivetech's failure to make discovery pursuant to the Court's discovery order, the second *Poulis* factor weighs in favor of dismissal. Almost four months have passed since Southco served its initial discovery requests on Fivetech (D.I. 70-1, Exh. A and D.I. 70-2, Exh. C). Although Southco provided a detailed critique of Fivetech's objections to Southco's discovery requests (D.I. 70-2, Exh. F), Fivetech never responded. When Southco sought to discuss the matter with counsel for Fivetech, Fivetech's counsel refused to discuss the disputed requests. (D.I. 70-2, Exh. G). After the Court's discovery order was entered, Southco attempted to initiate a negotiation as ordered by the Court as to Interrogatory No. 3 and Document

Request Nos. 3 and 4 (Baronian Decl., ¶ 6, Exh. D). However, Fivetech proposed limitations to the requests which excused Fivetech from making any discovery. (Baronian Decl., ¶ 7, Exh. E) Southco repeatedly sought to prod Fivetech into providing the discovery ordered by the Court. (Declaration of Antranig Baronian, ¶ 2, Exh. A; ¶ 4, Exh. C). Fivetech provided only an incomplete response to Interrogatory No. 5. (Baronian Decl., ¶ 3, Exh. B). Fivetech's failure to cooperate in discovery and its failure to obey the Court's order has occasioned substantial additional expenses for Southco. In addition, as the period for discovery has continued to run in the interim, Southco's ability to prepare its case for trial has been diminished. Thus, Fivetech has established a history of dilatoriness in this litigation, and thus the third *Poulis* factor weighs in favor of dismissal of Fivetech's two permissive counterclaims (IX and X). Similarly, the nature of the objections raised to the discovery requests, and the failure to cooperate in discovery suggest a lack of good faith. Therefore, the fourth *Poulis* factor weighs in favor of dismissal.

Regarding the fifth Poulis factor, Southco does not seek an order dismissing all of Fivetech's counterclaims, but only Counterclaims IX and X, which allege tortious interference and unfair competition by Southco's actions in Taiwan. The discovery Fivetech has failed to provide relate to these two counterclaims. Fivetech has provided an incomplete response to Southco's interrogatory seeking the identity of those individuals who have personal knowledge of the factual bases of these counterclaims, jeopardizing Southco's ability to prepare a defense. Similarly, Fivetech has ignored the Court's order requiring it to provide documents relating to indemnifications Fivetech has given to customers in Taiwan. A partial dismissal is appropriate under these circumstances.

Regarding the sixth *Poulis* factor, the merits of Fivetech's counterclaims, both hinge on the allegation that Southco knew its patents were invalid when it allegedly threatened Fivetech's customers with infringement. Fivetech has now filed a motion for partial summary judgment with respect to Southco's patents. (D.I. 92). However, Fivetech has not alleged the invalidity of any of the patents - the motion seeks only summary judgment that some (not all) of the claims of the patents are not infringed. If Fivetech had solid evidence of invalidity, surely the summary judgment motion would have sought to invalidate the patents based on such evidence. Thus, Fivetech's failure to move for judgment of invalidity strongly suggests that Fivetech's counterclaims IX and X are meritless.

As a whole, the *Poulis* factors weight in favor of granting the requested relief.

IV. CONCLUSION

Southco requests that the Court enter an order pursuant to Fed. R. Civ. P. 37(b)(2)(A)(3) dismissing Fivetech's counterclaims IX and X, and ordering Fivetech and Fivetech's counsel to pay Southco its reasonable expenses, including attorneys' fees, in respect of this motion.

Respectfully submitted,

July 27, 2011

s/Alex R. Sluzas/
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CERTIFICATION PURSUANT TO LOCAL RULE 26.1(f)

Counsel for Southco, Inc. certifies that the parties, after reasonable effort, as reflected in the accompanying supporting Declaration of Antranig Baronian, Esq., are unable to resolve the discovery disputes addressed in Southco, Inc.'s accompanying motion for sanctions.

Respectfully submitted,

Dated: July 27, 2011

s/Alex R. Sluzas/
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CERTIFICATE OF SERVICE

I hereby certify that a true copies of the foregoing PLAINTIFF SOUTHCO, INC.'S MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 37(b)(2) FOR FAILURE TO COMPLY WITH DISCOVERY ORDER, a supporting memorandum of law and Declaration of Antranig Baronian, a Certification pursuant to Local Rule 26.1(f), and a form of Order were filed electronically on July 27, 2011; and are available for viewing and downloading online from the ECF system.

Service upon Elizabeth S. Fenton, Esq., Michael C. Falk, Esq., Matthew P. Frederick, Esq., Cindy Hsinhsian Chou, and Glenn W. Rhodes, Attorneys for Defendant, will be effected by electronic service by a Notice of Electronic Case Filing on the date set forth below.

July 27, 2011

s/Alex R. Sluzas
Alex R. Sluzas (Pa. Bar 39931)